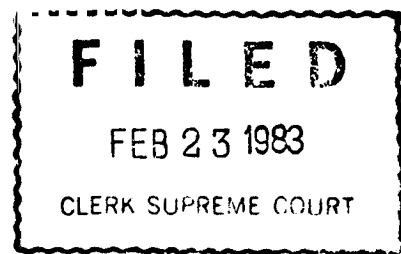


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed February 23. 1983

vs.

)

WILLIAM JOSEPH LYONS, JR.,

)

2-518

68187

Defendant-Appellant.

)

Appeal from Story District Court - Carl D. Baker, Judge.

Defendant appeals from his conviction of assault while participating in a felony asserting on appeal that the trial court abused its discretion 1) in denying his motion for mistrial based on the State's cross-examination of his character witness, and 2) in refusing to allow defendant to introduce evidence regarding the prosecuting witness's use of contraceptives. AFFIRMED.

Jerry L. Jones, Ames, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

JOHNSON, J.

Defendant, William Lyons, appeals from his conviction, after a jury trial, of assault while participating in a felony, as defined in Iowa Code § 708.3, and third degree kidnapping, as defined in Iowa Code § 710.4. Defendant asserts on appeal that the trial court abused its discretion (1) in denying his motion for mistrial based on the State's cross-examination of his character witnesses, and (2) in refusing to allow defendant to introduce evidence regarding the prosecuting witness's use of contraceptives. We affirm.

On March 30, 1981, defendant William Joseph Lyons, Jr., was charged by county attorney's information with third degree sexual abuse and third degree kidnapping. On July 30, 1981, the prosecutor filed a motion in limine asking that defendant be prohibited pursuant to Iowa R. Crim. P. 20(5) from presenting evidence of the use or nonuse of contraceptives by the prosecuting witness. Defendant summarily resisted the motion in limine which trial court granted.

On October 15, 1981, defendant filed a motion for permission to present evidence of the victim's use of contraceptives. Defendant asserted (1) that the evidence did not fall within Iowa R. Crim. P. 20(5) because the rule deals with "past sexual conduct rather than present sexual proclivities;" (2) that the evidence was relevant to defendant's claim that someone other than he had had intercourse with the victim on the night in question; and (3) that Iowa R. Crim. P. 20(5) violates defendant's constitutional right to confront the witnesses against him. The trial court found that the evidence was not relevant to any issue in the case and denied defendant's motion. A jury was then impanelled, and trial began on October 27, 1981. The jury found defendant guilty of assault while participating in a felony and third degree kidnapping. Additional facts will be discussed in relevant portions of this opinion.

I. Scope of Review. Our review is on assigned error only. Iowa R. App. P. 4.

II. Cross-Examination of Character Witnesses. Defendant asserts that the trial court erred in permitting improper cross-examination of defendant's character witnesses. Specifically, defendant complains of the State's cross-examination of Kim Ullrick and Peggy Faulkner, who were character witnesses for defendant.

A defendant in a criminal case may elect to place his character in issue. State v. Hamann, 285 N.W.2d 180, 184 (Iowa 1979); State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974); State v. Osborn, 200 N.W.2d 798, 808 (Iowa 1972); State v. Hobbs, 172 N.W.2d 268, 271 (Iowa 1969). "He does so by producing evidence of good character in order to show the improbability that he committed the crime." State v. Hamann, 285 N.W.2d at 184. "This principle is based upon the philosophy that a man of good character would not be likely to commit the crime of which he is accused." State v. Hobbs, 172 N.W.2d at 271. The State is not permitted to put the character of the defendant in issue. Id. at 271; State v. Osborn, 200 N.W.2d at 808.

Defendant complains that the State exceeded the bounds of proper examination of character witnesses and requests a mistrial.

It is well established that a witness who testifies to the good reputation of a defendant, relative to certain traits of character, may be asked, upon cross-examination, whether he has heard reports and rumors of particular acts or vices of said person inconsistent with the reports attributed to him by the witness. This is permissible to test the credibility of the witness by ascertaining his good faith, his conception of good reputation, the extent of his information and his accuracy, but not for the purpose of proving such acts or conduct.

State v. Kuel, 233 Iowa 852, 857, 5 N.W.2d 849, 852-53 (1943). "It is necessary that a large discretion be given to a trial court in the extent and character of each cross-examination." State v. Hild, 240 Iowa 1119, 1154, 39 N.W.2d 139, 159 (1949). "It has always been held proper to interrogate one, who testifies that a person's reputation in the community is good, on cross-examination, whether he

had not heard rumors and reports of matters derogatory to that reputation." Id. However, "... 'cross-examination should not be permitted to be used to covertly convey to the minds of the jurors suspicion and prejudice as to a defendant by a recital of facts of supposed matters not appearing in the evidence and wholly outside the case." State v. Kuel, 233 Iowa at 862, 5 N.W.2d at 855. See also Cross-Examination of Character Witness, 13 A.L.R. 4th 796 (1982).

In the present case, defendant called Kim Ullrick and Peggy Faulkner and elicited from them that the defendant had an excellent moral character. On cross-examination of witness Ullrick the State asked if she was familiar with an incident in which defendant "physically attacked, assaulted . . . and made sexual advances toward [Nico Helton]."¹ Defendant objected to the testimony and the trial court overruled his objection partly on the basis of State v. Hobbs, 172 N.W.2d 268, 271 (Iowa 1972). Later, in cross-examining witness Ullrick, the State asked whether she was aware "that there had been two reports to the Sexual Assault Center in Ames concerning the defendant. . . ."² Defendant objected to this question on the basis that it assumed facts not in the record and the trial court overruled the objection. In cross-examining witness Faulkner the State asked whether she had heard of the two reports made to the assault center about defendant.³ Again defendant objected to the question and the court overruled the objection. In instructing the jury the court instructed that the above questions and answers given "were for the limited purpose of impeaching the witnesses."

We believe that the State's cross-examination very nearly approaches the outermost bounds of proper cross-examination of character witnesses. However,

¹ The witness responded that she had heard of such an instance. When asked whether she considered this in her opinion as to defendant's reputation, she stated she "took everything she heard into consideration."

² The witness responded "No, I had not heard that."

³ The witness responded, "Yeah, I have heard of it. But, I mean, like I will go over to their house and eat; and he's taken me home about half-a-dozen times; and, I mean, I live out in the country and there's never been anything."

the trial court is vested with considerable discretion in permitting such cross-examination. State v. Hild, 240 Iowa at 1154, 39 N.W.2d at 159.

This court will not find an abuse of discretion in a denial of probation unless the defendant shows "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

The court made a point of the fact that these answers and statements were for the limited purpose of impeachment of the character witness and not a substantive evidence. It was for the jury to assess the credibility of the character witnesses who had not used such knowledge in giving an opinion on the defendant's good moral character.

Defendant also objects that such testimony was hearsay. "Reputation testimony is based upon the hearsay of a community and although hearsay is held inadmissible to prove other facts, it becomes the very source of reliability for [character] type of proof." State v. Hobbs, 172 N.W.2d at 272 (quoting M. Ladd, "Techniques and Theory of Character Testimony," 24 Iowa L. Rev. 498, 528 (1939)). We find defendant's hearsay objection without merit.

We have reviewed defendant's other objections to the State's cross-examination of defendant's character witnesses and find them unmeritorious. Accordingly, we affirm the trial court's ruling in admitting evidence.

III. Victim's Use of Contraceptives. Defendant claims as error the trial court's exclusion of evidence relating to the victim's use of contraceptives. Specifically, he claims that such evidence is "present" sexual conduct and not "previous" sexual conduct which falls under the purview of Iowa Rule of Criminal Procedure 20(5). We find it unnecessary to address defendant's novel contention.

The trial court excluded such evidence on the basis of relevance. Relying on the case of United States v. Kasto, (8th Cir) 584 F.2d 268 (1978), and Wilson v. State, 548 S.W.2d 51 (Texas 1977), the court found the evidence was irrelevant.

Defendant asserts that such evidence was relevant to show the victim "was amenable to sexual relations."

"The test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without such evidence." State v. Sheffly, 250 N.W.2d 51, 55 (Iowa 1977). We find no abuse of discretion in the court's exclusion of such evidence.

AFFIRMED.

All judges concur except Oxberger, C.J., and Schlegel, J., who dissent.

SCHLEGEL, J. (dissenting)

I dissent.

The State placed before the jury material that would have been inadmissible under any other test. This material consisted of supposed reports or suspicions of past conduct similar to that for which defendant was being tried. The questions did not refer to past convictions or arrests, but to "reports to the Sexual Assault Center in Ames concerning the defendant." For whatever reason this evidence was being offered in this trial, it was not an appropriate test of the credibility of defendant's character witnesses. Notwithstanding the State's claim that the evidence was directed at the credibility of defendant's witnesses on cross-examination, I believe that it was instead designed to convey to the minds of the jurors suspicion and prejudice as to the defendant of matters not appearing in the evidence and wholly outside the case. See State v. Kuel, 233 Iowa 852, 5 N.W.2d 849 (1943); State v. Rowell, 172 Iowa 208, 154 N.W. 488 (1915). Of course, the trial court has great discretion in determining the latitude of cross-examination, but such discretion is not unlimited.

I believe the court allowed the State to go too far in cross-examining defendant's character witnesses and that serious prejudice resulted. I would reverse defendant's conviction and remand for a new trial.

Oxberger, C.J., joins in this dissent.